No. 05-547

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, IMMIGRANT LEGAL RESOURCE CENTER AND IMMIGRANT DEFENSE PROJECT OF THE NEW YORK STATE DEFENDERS ASSOCIATION

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INTERESTS OF AMICI CURIAE[1]

This case manifests the wide and growing splits among the courts of appeals over the proper application of the "aggravated felony" drug trafficking definition to state simple possession drug offenses. As organizations that advise immigrants and train defense lawyers and judges on the immigration and criminal consequences of a conviction for drug possession, amici urge the Court to grant certiorari in this case so that this important question may be resolved and immigrants may make knowing and intelligent choices during their criminal proceedings.

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

The **National Legal Aid and Defender Association** (NLADA), a non-profit corporation, works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA's American Council of Chief Defenders is a leadership council that is dedicated to pro-

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amici state that no counsel for a party authored any part of the brief, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

moting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including non-profit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members. NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national non-profit membership association that devotes its resources exclusively to serving the equal justice community. NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of that effort, NLADA has filed amicus curiae briefs in major constitutional cases before the United States Supreme Court and other federal and state courts involving the administration of the criminal justice system and the right to counsel.

The **National Association of Federal Defenders** (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the NAFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented. Attorneys in the NAFD have been appointed by the federal courts to represent thousands of indigent defendants accused of violating 8 U.S.C. § 1326, illegal reentry into the United States following deportation. Because the penalty faced by these defendants increases dramatically if the deportation occurred after a prior conviction for an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43), the NAFD has a strong interest in the proper interpretation of the aggravated felony definition.

The **Capital Area Immigrants' Rights Coalition** (CAIR Coalition) is an association of legal groups, advocacy groups, and social service providers serving the immigrant community in the Washington D.C. metropolitan area. The CAIR Coalition acts as the primary source of representation for detained immigrants in the region - including those immigrants with criminal matters that may be affected by the diverse interpretations of the "aggravated felony" provision that the petition for certiorari in this case seeks to resolve. Because of the CAIR Coalition's belief in the inherent worth and dignity of immigrants, the CAIR Coalition is committed to a country where immigration laws and policy are fair, humane, just, and accord due process of law. The CAIR Coalition was formed in 1987 as the D.C. Community Coalition, first under the auspices of the Lawyers' Committee for Civil Rights and Urban Affairs and then from 1998-1999 as a division of the Catholic Legal Immigration Network, Inc. Since January 1, 2000, the CAIR Coalition has operated as an independent non-profit organization.

The **Immigrant Legal Resource Center** (ILRC) is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status and the immigration consequences of criminal convictions.

The **New York State Defenders Association** (NYSDA) is a not-for-profit membership association of more than 1,400 public defenders, legal aid attorneys, assigned counsel and others dedicated to developing and supporting high quality legal defense services for all people, regardless of income. Among other initiatives, NYSDA operates the **Immigrant Defense Project** (IDP), which provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications and training on issues involving the interplay between criminal and immigration law.

SUMMARY OF ARGUMENT

There are clear and growing splits among the circuit courts of appeals concerning the proper approach to determine whether a state simple possession drug offense may be deemed an aggravated felony as "illicit trafficking in a controlled substance." The circuits are sharply divided over whether a state drug offense may be considered an aggravated felony simply because it is a felony under state law without considering whether the offense would be a felony under federal law. Some circuits, but not others, would even apply the aggravated felony label to a state misdemeanor simple possession drug offense. Circuits are also divided over whether to apply the same or different tests in the immigration and criminal sentencing contexts. These circuit splits cry out for resolution by the Supreme Court, and for more careful consideration of differences in state and federal treatment of simple possession offenses and whether Congress intended for the drug trafficking category to include state simple possession offenses.

An award of certiorari is also appropriate in light of the importance of the underlying issues in these cases. In the immigration context, application of the aggravated felony label subjects a non-citizen to the harshest penalties in the immigration law. Virtually all non-citizens, including lawful permanent residents, are deportable if they have been convicted of a drug-related offense. When that drug offense is labeled an "aggravated felony," however, immigration judges are barred from granting asylum and other basic forms of relief from removal, no matter how harmful removal may be for the non-citizen or his family. This is true even for lawful permanent residents who have spent most of their lives in the United States, asylum seekers who have suffered or reasonably fear persecution in their home countries, members of the U.S. Armed Forces, and immigrants with U.S. citizen spouses and children.

In the sentencing context, application of the aggravated felony label vastly increases the consequences of a past conviction for a person who illegally re-enters the United States to a maximum penalty of twenty years in prison.

Given the severe penalties that follow application of the federal aggravated felony "illicit trafficking" label to state simple possession drug offenses, the Court should now resolve the uncertainty that has resulted from the circuit courts' multitude of interpretations. The proliferation of conflicting interpretations of the term undermines the rule of law. Because immigration judges apply the law of the circuit in which they sit, and because the Department of Homeland Security (DHS) routinely transfers detainees from one location to another, it is virtually impossible for an immigrant to know, and for counsel to advise effectively on, the possible future consequences of a state simple possession drug conviction.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE WIDE CIRCUIT SPLITS CONCERNING APPLICATION OF THE AGGRAVATED FELONY ILLICIT DRUG TRAFFICKING LABEL TO STATE SIMPLE POSSESSION OFFENSES

This case presents the question whether and when a state drug conviction for simple possession falls within the federal aggravated felony category of "illicit trafficking in a controlled substance." In this case, the Eighth Circuit Court of Appeals found that a single state drug possession conviction must be treated as a drug trafficking aggravated felony simply because the state classifies the crime as a felony, even though the offense would have been a misdemeanor under federal law. The courts of appeals are sharply divided on whether this is the correct interpretation of the drug trafficking category. Indeed, splits exist on this issue even within some circuits that have applied different interpretations of the term in immigration and criminal sentencing contexts.[2] By taking this case, the Court can resolve these conflicts.[3]

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[2] The Second and Ninth Circuits have expressly held that different rules apply in aggravated felony determinations in immigration proceedings, and in criminal sentencing cases involving sentence enhancements for the federal crime of illegal re-entry based on prior conviction of an aggravated felony. *See United States v. Pornes-Garcia*, 171 F.3d 142 (2d Cir. 1999); *Cazarez-Gutierrez v.*

Amici submit that the Eighth Circuit's approach in this case ignores the gap between how South Dakota - the state that convicted Mr. Lopez - and the federal government choose which drug possession offenses to classify as felonies. Federal law classifies virtually all first-time drug possession offenses as misdemeanors. *See* 21 U.S.C. § 844(a). In contrast, South Dakota law classifies virtually all possession offenses as felonies. *See generally* S.D. Codified Laws §§ 22-42-5 & 22-42-6 (2006) (penalties for possession of controlled substance and for possession of marijuana). An award of certiorari in this case will permit the Court to assess the relevance of such gaps between state and federal law in the treatment of different drug offenses, and this analysis may inform whether it was appropriate for the Eighth Circuit to have relied solely on the state's classification of the offense to determine

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Ashcroft, 382 F.3d 905 (9th Cir. 2004). The Fifth and Sixth Circuits have held that the term has the same meaning in both contexts. *See United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001); *United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005). Meanwhile, the Board of Immigration Appeals has held that it will apply the law of the circuit whether or not it arose in the immigration or sentencing context, and presumably will apply the law of the circuit as to whether the rule may be different in immigration as opposed to criminal cases. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002). Resolution of this issue is important because the splits between immigration and criminal sentencing cases are in tension with the long-standing principle that the court should interpret the use of a term in one context consistently with its interpretation applying any appropriate rule of statutory construction invoked in another context. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." (citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality opinion) for "applying the rule of lenity to a tax statute, in a civil setting, because the statute had criminal applications and thus had to be interpreted consistently with its criminal applications")).

[3] For a complete summary of the circuit splits on this issue, *see* Petition for a Writ of Certiorari at 7-13, *Lopez v. Gonzales*, No. 05-547 (filed Oct. 31, 2005). Amici note that there are at least three other petitions for certiorari also raising these circuit splits now pending before the Supreme Court. *See Salazar-Regino v. Moore*, No. 05-830 (petition for cert. filed Dec. 22, 2005) (immigration case); *Toledo-Flores v. United States*, No. 05-7664 (petition for cert. filed Nov. 15, 2005) (criminal sentencing case); *Mendoza-Torres v. United States*, No. 05-7496 (petition for cert. filed Nov. 9, 2005) (criminal sentencing case).

whether it should be deemed an "illicit trafficking" aggravated felony.

In finding a simple possession drug offense to be a "drug trafficking crime," the Eighth Circuit's approach also failed to consider the ordinary meaning of that term, in contravention of the Court's recent decision in *Leocal*, 543 U.S. 1. In *Leocal*, the Court unanimously affirmed the principle that statutory terms should be construed according to their "ordinary or natural meaning." 543 U.S. at 11-12 (finding that, in construing the "crime of violence" term referenced in the aggravated felony definition, one should consider the "ordinary meaning" of the term in addition to the definitional language).

By granting certiorari in this case, the Court will be able to address and resolve these important questions about what is the proper application of the aggravated felony "illicit trafficking" drug category to state simple possession drug convictions.

II. THE CIRCUIT SPLITS CONCERN APPLICATION OF THE SEVEREST PENALTIES IN BOTH THE IMMIGRATION AND CRIMINAL SENTENCING CONTEXTS

Non-citizens such as Mr. Lopez whose simple possession drug offenses are deemed "illicit trafficking" aggravated felonies suffer dramatically severe consequences in both the immigration and criminal sentencing contexts.

In the immigration context, Mr. Lopez and virtually any other non-citizen convicted of a drug offense is deportable.[4] Congress has chosen to mitigate the dramatic impact of this law by allowing immigration judges to find certain non-citizens eligible for depor-

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[4] *See* 8 U.S.C. § 1227(a)(2)(B), which provides:

> Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

tation relief. For example, immigration judges may grant asylum, cancellation of removal, or other relief from removal if non-citizens prove a threat of persecution upon removal or other sufficiently positive equities, such as long residence in the country, extensive family ties, evidence of rehabilitation, or extreme hardship. The aggravated felony determination, however, acts as a *per se* bar to these forms of relief, preventing immigration judges from granting relief even for those non-citizens whose continued presence here would benefit the United States. In addition, a lawful permanent resident, despite praiseworthy life accomplishments in the United States, is rendered forever ineligible for naturalization as a U.S. citizen.

In the context of the federal criminal sentence enhancement for the crime of illegal re-entry after removal, federal law subjects an individual with a drug possession conviction to a potentially vast sentence enhancement if that conviction is deemed an aggravated felony. Absent classification of a past conviction as an aggravated felony, the act of illegal re-entry subsequent to conviction of a simple possession drug offense carries a maximum penalty of two years in the case of an offense classified by the state as a misdemeanor, and ten years in the case of an offense classified as a felony. But when such a past simple possession drug offense is deemed by the federal government to be a drug trafficking aggravated felony, the person who has re-entered is subject to a maximum penalty of twenty years.

Despite these profoundly life-altering consequences of being deemed an aggravated felon, courts are currently adjudicating this critical determination inconsistently throughout the country as a function of the circuit splits.

A. In the Immigration Context, an Aggravated Felony Conviction Bars an Immigration Judge from Granting Asylum to a Non-Citizen Seeking Refuge from Persecution or from Waiving the Removal of a Long-Time Lawful Permanent Resident Who Demonstrates Favorable Factors, and Permanently Bars Naturalization

Because Congress has long recognized that removal has dramatic and devastating consequences for non-citizens and their families, the Immigration and Nationality Act contains several provisions that empower judges to grant relief from removal to otherwise deportable or inadmissible non-citizens based on their individual circumstances. Non-citizens with simple possession drug convictions, including lawful permanent residents who have lived in the United States for many years, will be ineligible for almost all of these forms of relief if they appear before an immigration judge in a jurisdiction where their offense is considered an aggravated felony.

For example, individuals who have suffered past persecution or who face a well-founded fear of future persecution in their home countries are eligible for asylum in the United States. For immigrants who cannot return to their countries of origin, asylum is a route to permanent residency and eventually U.S. citizenship. Immigrants who have been convicted of a "particularly serious crime," however, are statutorily barred from eligibility for asylum, and such forms of relief may even be revoked based on their convictions. *See* 8 U.S.C. §1158(b)(2)(A)(ii) & (c)(2)(B). An individual convicted of an "aggravated felony" is automatically deemed to have been convicted of a "particularly serious crime," *see* 8 U.S.C. §1158(b)(2)(B)(i), and therefore is statutorily barred from obtaining asylum or subject to termination of asylum. An immigration judge presiding over such a case lacks any discretion to grant or continue asylum, regardless of how great the danger of persecution the non-citizen would face if returned to her home country.

In addition, non-citizens who, like Mr. Lopez, have been granted lawful permanent resident status but who become deport-

able may be eligible for cancellation of removal if they have been lawfully admitted as permanent residents for at least five years and have spent seven continuous years in the United States. 8 U.S.C. § 1229b(a). Receipt of cancellation of removal depends upon the non-citizen's ability to show positive equities that outweigh the crime. Cancellation of removal has traditionally been an important form of relief for lawful permanent residents who have lived in the United States for most of their lives and lack meaningful ties to their home country, who have served in the U.S. Armed Forces, whose families would suffer if they were deported, or who can show proof of rehabilitation and good character. If they have been convicted of an offense deemed to be an aggravated felony, however, lawful permanent residents are statutorily barred from obtaining cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3) & (b)(1)(C). Application of the aggravated felony label to a simple possession drug offense therefore prohibits an immigration judge from considering even the most compelling individual circumstances and requires the removal of individuals who would otherwise qualify for the relief that Congress has made available.[5]

Finally, in order to naturalize and become a U.S. citizen, a non-citizen ordinarily must establish, among other things, that she has been a person of "good moral character" for five years, and that she has continued to exhibit good moral character while the naturalization application is pending. *See* 8 U.S.C. § 1427(a). In contrast, a non-citizen convicted of an aggravated felony after 1990 is permanently barred from naturalization because the Immigration and Nationality Act precludes any such individual from establishing good moral character. *See* 8 U.S.C. § 1101(f)(8).

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[5] A non-citizen with an aggravated felony conviction is also ineligible for voluntary departure in lieu of an order of removal. *See* 8 U.S.C. § 1229c(b)(1)(C). This form of relief allows a non-citizen to avoid the stigma and harassment of deportation, and permits her to leave within a designated period of time and at her own cost, giving her an opportunity to tie up her affairs in the United States before departure. Voluntary departure also allows a non-citizen to choose to return to a country other than her country of origin in order to avoid persecution.

B. In the Criminal Sentencing Context, an Aggravated Felony Conviction Increases the Maximum Penalty for Illegal Re-Entry to 20 Years Imprisonment

When convicted of the crime of re-entry into the United States after removal, a non-citizen is normally subject to a prison sentence of no more than two years. *See* 8 U.S.C. § 1326(a). If the individual's prior removal is found to be subsequent to conviction of "three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)," the maximum possible punishment increases to ten years. *See* 8 U.S.C. § 1326(b)(1). If, however, the individual's prior removal is found to be subsequent to a conviction of an aggravated felony, the maximum sentence increases to twenty years. *See* 8 U.S.C. § 1326(b)(2). This means that an individual who was convicted of a simple possession misdemeanor drug offense is subject to an increase in sentence maximum from two years to twenty years, and an individual who was convicted of a simple possession felony offense is subject to an increase in maximum sentence from ten years to twenty years, if the offense is deemed by the federal government to be a drug trafficking "aggravated felony."

III. THE CIRCUIT SPLITS UNDERMINE THE RULE OF LAW BY INTERFERING WITH IMMIGRANTS' ABILITY TO MAKE DECISIONS CONCERNING THE RESOLUTION OR LATER IMPACT OF CRIMINAL CHARGES THAT MAY HAVE PROFOUND IMMIGRATION CONSEQUENCES

As a result of the circuit splits we describe above, a non-citizen charged with a simple possession drug offense in criminal proceedings cannot know whether her offense will later be deemed an aggravated felony. She therefore is unable to know whether she might obtain any relief from removal, no matter how compelling her circumstances or whether she might be subject to a dramatically increased prison sentence for the offense of being found in the United States subsequent to removal. In fact, due to the circuit splits and the happenstance of where the government later chooses to detain an individual, two non-citizens convicted of the same

crime in the same state may face dramatically different immigration and criminal sentencing consequences.

Amici are organizations that are comprised of or serve defense attorneys whose clients could face removal and other severe immigration and criminal consequences as a result of a criminal disposition by guilty plea or trial conviction. In order to counsel immigrant clients properly about the relative advantages and disadvantages of taking a plea, criminal defense attorneys must be fully informed about the implications that a conviction may have for the non-citizen's immigration status. Amici's mission includes training attorneys to give sound legal advice to their clients, including non-citizen clients.

The circuit splits make it very difficult for amici to carry out this task because it is virtually impossible to predict where non-citizens will face removal proceedings. DHS detains non-citizens convicted of simple possession drug offenses, *see* 8 U.S.C. § 1226(c)(1)(B), and may detain them in any detention facility in the country, including in a circuit other than the ones in which their criminal proceedings took place or in which they reside. Furthermore, DHS may detain a non-citizen U.S. resident upon her attempted return to the United States after a trip abroad, if she is found inadmissible as a result of a prior conviction. A non-citizen may also be detained due to a prior conviction if she comes to the attention of DHS through an application for a new immigration status, such as naturalization. Lastly, non-citizens seeking asylum in the United States may be subject to detention while their asylum applications are processed. The non-citizen's immigration proceedings may therefore take place in the circuit of detention, the circuit of return to the United States, or the circuit of application for a new immigration status, and be governed by that circuit's case law even if it is a different circuit from the one in which the non-citizen's criminal proceedings occurred.

The circuit splits therefore result in far more than the obvious effect of subjecting an individual with a simple possession drug conviction in one circuit to unfavorable immigration and criminal sentencing consequences while another individual with a similar conviction in another circuit is not so subject; it also has the effect of preventing their knowing what circuit law will later govern their

immigration or sentencing case. The Board of Immigration Appeals has held that in determining whether a drug conviction constitutes an aggravated felony, immigration judges must defer to the interpretation given to the phrase "illicit trafficking in a controlled substance" by the circuit in which they sit.[6] Given the current circuit splits, DHS' practice of detaining non-citizens in facilities throughout the country, without regard to the state in which they reside or the state in which the conviction occurred, means that any circuit's rule may apply to any one individual.

Non-citizens placed in detention in New York, for example, are commonly transferred to county jails in New Jersey (with hearings before immigration judges in New York City, in the Second Circuit, or Newark, in the Third Circuit), York, Pennsylvania (Third Circuit), or Oakdale, Louisiana (Fifth Circuit). Each of these Circuits applies a different rule regarding whether and under what circumstances a state simple possession drug conviction may constitute an aggravated felony. As a result, a New York resident will face vastly different immigration consequences depending solely upon where the government chooses to detain her. A long-time lawful permanent resident with U.S. citizen children who has a New York simple possession drug conviction, if detained in Louisiana, may be deemed to have been convicted of an aggravated felony and denied any possibility of relief from removal. The same person convicted of the same simple possession offense, if detained in Pennsylvania, will be eligible for cancellation of removal, permitting her a chance to remain in the United States to care for her children.

Furthermore, individuals are commonly detained in several different circuits during the course of the removal process. A typical scenario involves a New York resident, convicted in New York and arrested by immigration officials at the probation office, transferred to a county jail in New Jersey, where he may or may not see an immigration judge for a bond hearing, and finally transferred to Oakdale. Family members in New York are likely to contact New York attorneys and advocates on his behalf, while the non-citizen

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[6] *In re Yanez-Garcia*, 23 I. & N. Dec. at 396.

himself may speak with an attorney in New Jersey before proceedings finally commence in Louisiana. Due to the circuit splits, any legal advice he or his family receives becomes useless as soon as he is transferred to a facility in another circuit.

As detention plays a growing role in immigration enforcement, the lack of predictability within the law becomes increasingly troubling. The numbers of non-citizens detained through these different routes has risen steadily in the past ten years. From 1996 to 2004, the size of the daily population in DHS detention facilities increased by more than 150%, from 9,011 in 1996 to 22,812 in 2004.[7] Over the course of a given year, hundreds of thousands of non-citizens will be detained. In 2002, DHS detained approximately 202,000 non-citizens. Of this number, DHS asserts approximately 103,000 had criminal records.[8]

As a result of the circuit splits, then, thousands of non-citizens are unable to predict the devastating immigration consequences that could follow from a simple possession drug conviction, because those consequences depend entirely on where the non-citizen is detained. This is especially so in a criminal court system where attorneys serving indigent defendants, the prosecutors who try their cases, and the judges who hear them all carry massive caseloads. This over-burdened system usually depends on all but a handful of cases being disposed of through plea bargains. Advocates may have only minutes to talk to their clients before a hearing at which a plea can be taken; it is essential for attorneys to have clear rules to govern the advice they provide, especially when

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[7] Alison Siskin, Congressional Research Service, *Immigration-Related Detention: Current Legislative Issues*, CRS Report RL32369, 12 (2004), *available at* http://www.fas.org/irp/crs/RL32369.pdf. DHS' Bureau of Immigration and Customs Enforcement (ICE) operates eight detention facilities around the country, and augments the capacity of its own detention facilities with an additional seven contract detention facilities. ICE also uses state and local jails on a reimbursable basis, joint federal facilities with the Bureau of Prisons, the Federal Detention Center in Oakdale, Louisiana, and a contractor owned and operated facility in Eloy, Arizona. U.S. ICE Office of Detention and Removal (DRO), http://www.ice.gov/graphics/dro/ (last visited Dec. 22, 2005).

[8] Siskin, *supra* note 7, at 12.

the potential immigration consequences far outweigh the penal consequences.

The experience of amicus IDP illustrates how the current circuit splits interfere with efforts to provide sound legal advice to immigrants facing pending criminal charges in the criminal justice system. IDP's mission includes providing information to immigrant defendants and their attorneys to assist them in making decisions during their criminal proceedings that may have drastic immigration consequences. IDP runs a hotline that receives more than 1,000 calls per year from immigrants and advocates. Many of these calls involve questions about the potential immigration consequences of a guilty plea in simple possession drug cases. Given the current circuit splits in interpreting the term, however, it is virtually impossible to advise such callers, because neither IDP nor the defendant can predict what law will apply in any subsequent immigration case.

Moreover, amici also serve non-citizens with past convictions, many of which are decades old. These individuals seek advice regarding a host of immigration-related decisions. For example, they often seek advice about whether or not to file for naturalization, whether or not to leave the country on business trips or to visit family, and whether or not to apply for a replacement green card. A lawful permanent resident with U.S. citizen children and a U.S. citizen spouse may seek advice about whether or not she should leave the country in order to visit a dying parent. If she has a past simple possession drug conviction, she could be deemed inadmissible upon her return. If placed in detention upon her attempted return to the United States, she might be transferred to any detention facility in the country, and it is virtually impossible to know whether her drug possession conviction will render her ineligible for the discretionary relief from removal that her compelling circumstances might otherwise afford her.

In sum, the circuit splits, coupled with DHS detention transfer policies, make it extremely difficult to predict what consequences will follow from a guilty plea or a decision to go to trial. As a result of the splits, a non-citizen convicted of a simple possession drug offense may be subject to drastically different consequences depending solely upon where she is detained. A stable and uni-

form definition of the "aggravated felony" drug trafficking term is necessary for defense attorneys and immigrant advocates to advise immigrants who are making decisions that could have life-altering consequences for themselves and their families. Without uniformity in the interpretation of the term "aggravated felony," stability and predictability within the legal system become elusive concepts to non-citizens struggling to make informed choices during and after their criminal proceedings.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the petition for the writ of certiorari should be granted.

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Respectfully submitted,

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